No. 22399 and 22399A

IN THE

United States Court of Appeals

FOR THE NINTH CIRCUIT

WILLIAM A. PEARSON,

Appellant,

vs.

ROBERT W. HEISER and
SANDRA STAMPER,

Appellees.

CLOSING BRIEF FOR APPELLANT

LILLICK, MCHOSE, WHEAT,
ADAMS & CHARLES
JOHN C. MCHOSE
DAVID BRICE TOY
600 South Spring Street
Los Angeles, California 90014

Attorneys for Appellant

Jeffries Banknote Company, Los Angeles — 746-1611

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INTRODUCTION

This closing brief will respond only to the principal points raised by the Heiser and Stamper briefs.

Pearson recognizes that the rule of *McAllister v. United States* (1954) 348 U.S. 19 governs in this Circuit and that appeals in admiralty are restricted by the "clearly erroneous" doctrine. We have not based this appeal on any contrary rule, but have accepted the facts found by the District Court for the purposes of this appeal. Nevertheless, we submit that this Court is not constrained by *McAllister* to affirm the decision below. For the reasons stated herein we believe this Court should rule that the District Court erred in concluding,

under the facts found, that Pearson was negligent or that his negligence was the proximate cause of the collision, or that his fault — if any fault there be — was not a minor fault within the meaning of the major-minor fault rule in admiralty cases.

I

This case is not controlled by the "clearly erroneous rule". It arises out of the Trial Court's imposition of an erroneous standard of care.

We do not mean to be understood as conceding fault on this appeal by making reference to the major-minor fault rule. As Griffin has noted [*Griffin on Collisions* 505-9] the major-minor fault rule is in fact a polyglot of rules, not all of which accept fault of both parties as a precondition for their application. In part the rule is a rule of evidence, the thrust of which is "fault not proved". Hence Stamper's authorities as to the position of an innocent third party [Stamper Br. 15] are not in point: On the authorities cited below and in our opening brief, Pearson contends that neither his fault nor the casual relation of his conduct to the collision was shown. This Court should have clear what the findings and conclusions, and the evidence before the trial court, do *not* show:

(i) Neither the findings nor the evidence sustains Heiser's statement that a steady red and green light would have been visible had Pearson been looking for it. This is sheer supposition. The only pertinent testimony was that of the experts called by the two boat operators. De Fever stated that no lights were visible. Captain Wetmore and the photographer Thompson, testifying for Heiser, stated that the running lights alternated between red and green and the white light was intermittently obscured *at the critical speeds*

[R. 622, 626, 639-40, Ex. H-19]. Thus the only possible conclusion on the evidence before the Court, as viewed in a light most favorable to appellees, was that Pearson's target was presenting alternate red and green running lights and no white stern light at all.

(ii) Stamper's argument to the contrary notwithstanding, there is no evidence at all in the record, nor indeed any finding, regarding the audible noise level on the night of the collision. The burden of showing that Pearson should have *heard* as opposed to *seen* the approaching Heiser boat clearly rested with the claimants against his petition. *Walston v. Lambertson* (9th Cir. 1965) 349 F.2d 660. Nothing having been presented on this argument, the argument must necessarily fall and with it, incidentally, falls the case upon which Heiser primarily relies [Heiser Br. 19] to refute the application of major-minor fault rule. *Feige v. Hurley* (6th Cir. 1937) 89 F.2d 575 was a "failure to hear" case, as the appellate court clearly noted at page 577.

(iii) There is no substantial evidence regarding the visibility of Heiser's boat in silhouette against the background lights of Black Meadow Landing. The inference proposed by Heiser, which does not appear as a finding, is contrary to the testimony of the witnesses actually on the water and those standing on shore. See for example the testimony of Bird [R. 690-691] and Parmelee [R. 719, 724]. Chief Bandel was not on the water that night and his testimony was hypothetically stated. [R. 401].

The trial court must, therefore, necessarily have concluded that Pearson's fault lay in his failure to see the approaching Heiser craft *without more*. This, it is submitted, is not the law. Even the authorities cited by both appellees show that a variable standard is applicable to

the duties and obligations of a lookout. In addition, numerous courts have held that the absence of a lookout does not violate the standard required by the lookout rule. *E.g. Lind v. United States* (2nd Cir. 1946) 156 F.2d 231; *Atkins v. Lorentzen* (5th Cir. 1964) 328 F.2d 66; *Koch Ellis Marine Contractors, Inc. v. Chemical Barge Lines, Inc.* (5th Cir. 1955) 224 F.2d 115.

In effect, the trial court failed to give any weight to the need for evaluation which the situation confronting Heiser presented. As the *Lind* case points out, it is not enough that a lookout perceive an approaching object; a lookout must also evaluate the object accurately so as to take evasive action. On the evidence before the trial court, there is nothing to show that Pearson *could have evaluated* either Heiser's course or speed. In disregarding this aspect of the lookout problem, the trial court imposed an absolute standard. Such a standard is not a question of fact but is always a matter for the court and as such should be corrected by this Court. *Restatement, Torts 2nd,* Section 328B; Cf. *Amaya v. Home Ice Co., Inc.* (1963) 59 Cal.2d 295.

II

Even viewed as a matter of fact, the trial court's finding of negligence and causation was clearly erroneous.

As we have indicated, we view the nature of this appeal as being one arising out of an improper standard of care imposed upon a small boat operator. However, even assuming that only fact issues are presented for review, we nevertheless believe that the finding as to negligence and causation [R. 77] is clearly erroneous. Both appellees stress that Pearson was still "looking for a hat" at the time of the collision. Accepting this and the District Court's finding of that effect, wherein is the negligence?

Was it negligent for Pearson to concern himself with a prominence on which he feared grounding? Was it negligent for him not to anticipate that the *only other boat on the water* — a boat which he knew was safely past him and headed for shore — would suddenly reverse course and charge blindly and precipitately at him? We submit not.

The Heiser brief stresses "danger" on confined waters trafficked by speed boats as though peaceful Lake Havasu was a busy harbor with craft roaring all about at high speeds. Actually at 10:00 o'clock on a Friday night there was very little activity. The only testimony on this was in cross-examination of Pearson. He saw lights of one boat which passed astern of him coming down river (R. 131). Pearson had completed the turn a considerable time before the collision (R. 144). He continued at slow speed of not more than 2 or 3 mph (R. 138, R. 144). He was asked:

> "Q Right, and you knew and had reason to know that the area around this point was heavily traveled with weekend vacationers, many of whom had experience and many of whom did not have experience in the operation of small boats, did you not?
>
> THE COURT: At what time, counsel?
>
> BY MR. CAIDEN:
>
> Q At the time you were out there that evening?
>
> A No, sir, there was not a lot of traffic at that time of the — on a Friday night, in the water, if you are talking."

The Heiser brief also discusses the risk when speed boats capable of 30 mph approach each other. We would readily grant that if Pearson had been speeding at 30 mph, or even much less, and thereby risking running down another boat, a vastly different standard of care

would have been required. Here, however, Pearson was proceeding slowly, at 2 to 3 mph (R. 49, 50, 82, 144). He had no reason to expect another boat, particularly Heiser's, might head for him without even a lookout and run him down.

The speed of the Heiser boat is de-emphasized in the Heiser brief by referring to the testimony of Heiser that he accelerated *gradually* (R. 222), and *ultimately* reached a speed of about 20-23 mph (F. 11). However Heiser testified he *did* speed up after he completed his turn (R. 223) and Schoning confirmed that Heiser accelerated as he came out of the turn (R. 270). Bird, who watched the Heiser boat from the shore also confirmed that Heiser accelerated away from the landing at a speed up to 20 or 25 mph (R. 690, 691).

The Heiser brief quotes at length from Pearson's description of the collision made during Coast Guard proceedings a few days after the accident. Portions are italicized. It is apparently suggested that it was somehow wrong for Pearson to be concerned about the point of land to his left which he was watching for to be sure to avoid running aground. The District Court found Pearson's attention was "predominantly to his left," apparently concluding this was negligent. We submit such a conclusion is wholly unjustified.

In the same quote on Page 8 of the Heiser brief counsel italicize Pearson's words, "I didn't pay much attention." Taken in context, it is clear Pearson referred only to the boat which had passed astern of Pearson, — not to what Pearson was doing just before collision. (R. 142, 143).

On Page 9 counsel also emphasize the argument that Pearson was also "still looking for the hat" at the time of collision — urging of course that this also was negligent.

Indeed, appellees present to this Court a case which was not before the court below. To say that a boat operator traveling at high speeds in a heavily trafficked area should be alert has little to do with the facts of this case. Of even more importance, the trial court should have recognized that Pearson's failure to see Heiser was in no way an effective cause of the accident. At most, it was merely a condition upon which the apparent and conceded negligence of Heiser operated. *P. Dougherty Co. v. United States* (3rd Cir. 1953) 207 F.2d 626, 631, cert. den. (1954) 347 U.S. 912, and authorities cited. As indicated by the cases set out in our opening brief, the negligence of Heiser, in itself, was sufficient to account for the collision. *Compania de Maderas de Caibarien S.A. v. The QUEENSTON HEIGHTS* (5th Cir. 1955) 220 F.2d 120, cert. den. 350 U.S. 824. In the circumstances, Pearson was entitled to have his fault and its effect upon the collision established beyond a reasonable doubt. *Compania Nacional de Navegacao Casteiro Patrimonio v. Cabins Tanker Industries, Inc.* (4th Cir. 1961) 285 F.2d 592, 594, cert. den. 366 U.S. 948. This, it is submitted, was not done, and for this reason the trial court's decree should be reversed.

III

Assuming Pearson's fault, the major-minor fault rule should nevertheless have been applied.

Heiser proposes, without citation to authority, that the trial court was governed by rules for a crossing situation in which the Pearson boat was the burdened vessel. This is clearly not the case. The navigating rules presuppose that approaching vessels are in sight of one another and can check each other's position. *Lind v. United States, supra; Borcich v. Ancich* (9th Cir. 1951)

191 F.2d 392 (and cases cited at note 4). While Heiser was proceeding away from Pearson no relation between them existed. There was no need for precaution on Pearson's part. Only when Heiser turned did a "risk of collision" arise. *At that point* Heiser know where Pearson was and knew he was headed toward Pearson. Pearson then had no reason to suspect Heiser's approach. Even assuming he thereafter failed to see him, such failure occurred in extremis and was subject to the application of the rule governing special circumstances. Obviously the Court so felt. Had it not, then why would it have ruled against Heiser (presumably the privileged vessel) without taking the case under submission while submitting the question of liability of the *burdened* vessel. On the facts found, the Court cannot have applied the crossing rules. We submit it would have been clearly erroneous for it to do so.

The cases upon which Heiser relies to establish the nonapplicability of the major-minor fault rule do not do so for this situation. The case which Heiser says is most favorable to his position [*Feige v. Hurley, supra*] has already been distinguished. The *Tug MALUCO I* case [*Esso Standard Oil Company v. Oil Screw Tug MALUCO I* (4th Cir. 1964) 332 F.2d 211] is one in which the court was dealing only with the question of positioning a special lookout, in circumstances where the helmsman was blinded by an approaching searchlight aboard the tanker with which she ultimately collided. *Curtis Bay Towing Company v. Sadowski* (4th Cir. 1957) 247 F.2d 422 lacks two critical elements which are present here; namely, the short interval of time within which to sight the approaching Heiser craft and, second, the impossible problem of evaluation which confronted Pearson. It is submitted that this case is properly resolved upon the principles of yet another decision of the Fourth Circuit:

"The case is a typical one for the application of the established rule that when the fault on the part of one vessel in a collision, sufficient to account for the disaster, is established by uncontroverted proof it is not enough to raise doubts about the management of the other vessel, but in order to hold her liable there must be proof of fault beyond a reasonable doubt." *Compania Nacional De Navegacao Casteiro Patrimonio v. Cabins Tanker Industries, Inc., supra,* at 594.

CONCLUSION

For the foregoing reasons and for the reasons set out in our opening brief we submit the trial court erred both in the legal standard which it applied to Pearson's conduct and in the factual standard from which it drew its findings of negligence and proximate cause.

Respectfully submitted,

Lillick, McHose, Wheat,
Adams & Charles

John C. McHose
David Brice Toy

Attorneys for Appellant

CERTIFICATE OF COUNSEL

I certify that, in connection with the preparation of this brief I have examined Rules 18, 19 and 39 of the U. S. Court of Appeals for the Ninth Circuit, and that, in my opinion, the foregoing brief is in full compliance with those rules.

_____

Attorney